

Comments submitted by Interested Persons

- Town of Madawaska // Legal Representative – Bernstein Shur

BERNSTEIN SHUR

C O U N S E L O R S A T L A W

207 623-1596 main
207 626-0200 fax
bernsteinshur.com

146 Capitol Street
PO Box 5057
Augusta, ME 04332-5057

Lee K. Bragg
lbragg@bernsteinshur.com

VIA FAX AND ELECTRONIC MAIL

November 6, 2007

Cynthia S. Bertocci, Executive Analyst
Board of Environmental Protection
c/o Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Appeal of Department Order #L-23564-2B-A-N, Cayer Boat Ramp, Madawaska

Dear Ms. Bertocci:

This office represents the Town of Madawaska in the above-referenced matter. As you know, Richard Cayer of 245 Lake Shore Road, St. David, Maine, applied for a Natural Resources Protection Act ("NRPA") permit for a proposed permanent boat landing to be located at Lot 20, Map 34 (Birch Point) in Madawaska, Maine. The Department of Environmental Protection (the "Department") denied Cayer's request and Cayer appealed.

On September 25, 2007, we were notified of Cayer's request to include in his appeal materials certain supplemental evidence (photographs) that are not a part of the licensing record. On October 10, 2007, we submitted a letter objecting to Cayer's request. On October 17, 2007 we received a letter indicating that the supplemental photographs have been allowed into the record.

The Town now offers the following comments regarding the significance of the photographs relative to the merits of Cayer's appeal:

1. The photographs provide inadequate grounds for reversal of the Department's decision

The photographs that Cayer has submitted as supplemental evidence are pictures of existing structures on Long Lake in the vicinity of Cayer's proposed boat ramp. Cayer has submitted these photographs to support his contention that there is already significant "clutter" along the shoreline and that his boat ramp will therefore not constitute an unreasonable negative impact on the scenery and aesthetics of the existing shoreline.

The Town readily concedes the existence of a variety of structures along the shore of Long Lake. The Town has not reviewed the permitting history of each property photographed by Cayer to determine the accuracy of his assertion that many of the structures exist illegally. Nor can the Town account for the tastes of landowners who paint their camps in strange colors or decorate their riprap with white stripes. Cayer may not rely on the existence of illegal,

unaesthetic or grandfathered structures to bolster his claim for a ramp. Just because others have acted illegally or exercised poor judgment in decorating their properties does not give Cayer an excuse to add to the "clutter" that he criticizes. As to grandfathered structures, Cayer himself notes that the State's policy is to gradually eliminate non-conforming structures, a policy which would again result in the removal of some of the "clutter" that he criticizes in one breath and wishes to add to in the next. Regardless, a discussion of legally non-conforming properties is entirely irrelevant to this appeal.

The DEP is fully within its rights, and is in fact required by statute, to consider the visual impact of Cayer's proposed boat ramp. Both the state statute regarding NRPA applications, as well as the application itself, are clear that the Department will consider, among other things, the scenic and aesthetic impact of a proposed project. Specifically, 38 M.R.S.A. §480-D states that "The department shall grant a permit upon proper application and upon such terms as it considers necessary to fulfill the purposes of this article. The department shall grant a permit when it finds that the applicant has demonstrated that the proposed activity meets the following standards." The very first standard set forth is that "the activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses." See 38 M.R.S.A. §480-D(1). The Department determined, based on a review of the vicinity of the proposed ramp, that there would be a negative impact on the scenery and aesthetics of the area.

2. The Department's decision stated a second, perhaps more significant, reason for rejecting Cayer's application

Even if the Board agrees that Cayer's proposed boat ramp will not unreasonably interfere with existing scenic and aesthetic uses, there is another significant basis for the Department's decision that is unaddressed by the supplemental photographs. Specifically, the Department also found that "the proposed activity will violate state water quality laws including those governing the classifications of the State's waters in that the project would result in fill material being placed adjacent to a great pond and would cause lake bottom wetland to be impacted, provide a conduit for sediments, associated nutrients, and other pollutants to enter the lake." For this reason alone, the Board should uphold the Department's denial of Cayer's application.

Sincerely,



Lee K. Bragg

LKB/aam

Cc: Christine Therrien, Town Manager
Mr. Richard Cayer
Bob Bellefleur, Esq.
Mr. Robert Deschene
Mr. David Rouleau

BERNSTEIN SHUR

COUNSELORS AT LAW

207 623-1596 main
207 626-0200 fax/tele
bernsteinshur.com

146 Capitol Street
PO Box 5057
Augusta, ME 04332-5057

Lee K. Bragg
lbragg@bernsteinshur.com

VIA FAX AND ELECTRONIC MAIL

October 10, 2007

Cynthia S. Bertocci, Executive Analyst
Board of Environmental Protection
c/o Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Appeal of Department Order #L-23564-2B-A-N, Cayer Boat Ramp, Madawaska

Dear Ms. Bertocci:

This office represents the Town of Madawaska in the above-referenced matter. As you know, Richard Cayer of 245 Lake Shore Road, St. David, Maine, applied for a Natural Resources Protection Act ("NRPA") permit for a proposed permanent boat landing to be located at Lot 20, Map 34 (Birch Point) in Madawaska, Maine. The Department of Environmental Protection (the "Department") denied Cayer's request, and Cayer is appealing this denial.

On September 25, 2007, we received your letter regarding Cayer's request to include in his appeal materials certain supplemental evidence (photographs) that are not a part of the licensing record. The Town objects to Mr. Cayer's request for the following reasons:

1. Failure to comply with Chapter 2, Section 24B(5)(a) of the Department's Rules Concerning the Processing of Applications. Section 24B(5)(a) requires an applicant seeking to supplement the record to show "*due diligence in bringing the matter to the Department's attention at the earliest possible time*" (emphasis added). The Department Order denying Cayer's request for a NRPA permit was dated June 12, 2007. Cayer had thirty days, or until July 12, 2007, to appeal the Department's denial. Cayer's appeal was submitted to the DEP on July 11, 2007, and thus was filed a mere twenty-four hours prior to the expiration of his appeal deadline. The photographs that Cayer proposes to submit as supplemental evidence were taken on July 7, 2007, five days before the appeal deadline. At a minimum, Cayer should have brought the photographs to the Board's attention on July 7th, rather than July 11th. Whether five days or one day prior to the appeal deadline, however, neither timeframe complies with the Department's requirement of bringing the photographs to the Department's attention at the earliest possible time. The photographs are pictures of existing structures and boat ramps on Long Lake – all of which have been in existence during the pendency of Cayer's appeal and were thus capable of being photographed and brought to Board's attention at the inception of his appeal.

2. Failure to comply with Chapter 2, Section 24B(5)(b) of the Department's Rules Concerning the Processing of Applications. Section 24B(5)(b) allows an applicant to add supplemental evidence where the evidence is newly discovered and could not, by exercise of reasonable diligence, have been discovered in time to be presented earlier in the licensing process. The photographic evidence that Cayer wishes to add to the record is not newly discovered evidence and should not be allowed.

Cayer proposes to introduce photographs of other properties on Long Lake to support his contention that there is already significant "clutter" along the shoreline and that his boat ramp will therefore not constitute an unreasonable impact on the scenery and aesthetics of the exiting shoreline. Cayer's appeal states that the supplemental photos were not part of his original application because he "never imagined that such a claim of no unreasonable visual impact would be used or even considered." However, both the state statute regarding NRPA applications, as well as the application itself, are clear that the Department will consider, among other things, the scenic and aesthetic impact of a proposed project. Specifically, 38 M.R.S.A. §480-D states that "The department shall grant a permit upon proper application and upon such terms as it considers necessary to fulfill the purposes of this article. The department shall grant a permit when it finds that the applicant has demonstrated that the proposed activity meets the following standards." The *very first* standard set forth is that "the activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses." See 38 M.R.S.A. §480-D(1). Additionally, as part of his NRPA application, Cayer was required to complete the Department's Visual Evaluation Field Survey Checklist, along with a description of the property, the proposed project, and photographs. Question 1F(3) of the survey inquires specifically about the visibility of the use from a public resource such as a great pond.

Even if Cayer did not familiarize himself with the statutory requirements for obtaining a NRPA permit, when he filled out his application he knew that the visual impact of his boat ramp would be considered. It was Cayer's obligation to present the strongest application possible, with all of the supporting evidence he could muster. Evidence of the unsightliness of other properties on the lake is irrelevant to the Department's consideration of whether Cayer's project is unsightly. Moreover, Cayer should not now be allowed to take a second bite at the apple – offering more evidence in support of his position in response to one of the Department's reasons for rejecting his application. If applicants were allowed to engage in an endless route of rebutting the Department's reasons for its decisions, no matter would ever come to a conclusion.

Sincerely,



Leo K. Bragg

LKB/aam